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Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OMAIMA NELSON,
Petitioner - Appellant,

- VS. -

GWENDOLYN MITCHELL,
Warden, et al.,

Respondent - Appellee.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit
U.S.C.A. No. 04-55124
U.S.D.C. No. CV-02-00615-CAS

PETITION FOR WRIT OF CERTIORARI
Volume 1 of 2

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's frequent, unexpected, and debilitating manifestations of her mental disorder are extraordinary circumstances beyond her control such that equitable tolling of the one year statute of limitation imposed by the Antiterrorist Effective Death Penalty Act (AEDPA) should have been allowed by the district court?

LIST OF ALL PARTIES WHOSE JUDGEMENT IS SOUGHT TO BE REVIEWED PURSUANT TO SUP. CT. R. 14(B)

I. United States Court of Appeals for the Ninth Circuit
   (A) Denial of Petitioner's motion for reconsideration filed June 1, 2004
   (B) Denial of Petitioner's request for a certificate of appealability filed April 30, 2004

II. United States District Court, Central District of California, Western Division
Christina A. Snyder, United States District Judge
   (A) Order Denying Certificate of Appealability filed January 5, 2004
   (B) Judgement denying Petition and dismissing Petition with prejudice filed November 24, 2003, and entered November 25, 2003.
   (C) Order (1) Accepting and Adopting the Amended Report and Recommendation of the United States Magistrate Judge, and (2) Dismissing the Petition for Writ of Habeas Corpus filed November 24, 2003, and entered November 25, 2003.

III. United States District Court, Central District of California, Western Division
Victor B. Kenton, United States Magistrate Judge
   (A) Amended Report and Recommendation of United States Magistrate Judge filed October 17, 2003.

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No. _____

IN THE

Supreme Court of the United States

OMAIMA NELSON,
Petitioner - Appellant,

- VS. -

GWENDOLYN MITCHELL,
Warden, et al.,

Respondent - Appellee.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit
U.S.C.A. No. 04-55124
U.S.D.C. No. CV-02-00615-CAS

PETITION FOR WRIT OF CERTIORARI

Petitioner, OMAIMA NELSON, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 1, 2004, which ultimately affirmed the holding of the United States District Court, Central District of California, Western Division, which had denied Petitioner's request that due to her debilitating mental condition it caused an extraordinary circumstance that should have allow equitable tolling of the statute of limitations imposed by AEDPA.

OPINION BELOW

On June 1, 2004, Petitioner's motion for reconsideration was denied by the United States Court of Appeals for the Ninth Circuit. No opinion was expressed by the appellate court for the denial. This Petition for Writ of Certiorari is timely filed pursuant to Sup. Ct. R. 13.3.

Synopsis of United States District Court Magistrate's Amended Report and Recommendation

At the district court, the magistrate denied Ms. Nelson's petition as being untimely filed. See October 17, 2003, Amended Report and Recommendation of United States Magistrate Judge. See Appendix F. Further, the magistrate stated that there was no basis for equitable tolling of the statute of limitations. Appendix F10. The magistrate disagreed with the contention that Ms. Nelson was not sufficiently competent to assist in her filing by July 1, 1999. Appendix F19. The magistrate stated that the doctrine of "judicial estoppel" should be invoked claiming that Petitioner's counsel had taken inconsistent positions. Appendix F19. The magistrate quoted Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) which basically held that a court can preclude a party from changing positions over the course of the proceedings. Appendix F19. The magistrate stated that Petitioner's Counsel had "directly contradict[ed] earlier assertions that by mid-1998 Petitioner was sufficiently competent to assist" counsel by counsel having later asserted that "'[T]he Petitioner still exhibited significant signs of mental incompetency which interfered with the preparation of the Habeas Petition; . . . .'" Appendix F19.

The magistrate refused to consider any new evidence presented in Ms. Nelson's Objections to a Magistrate Judge's Report and Recommendation. Appendix F22. The magistrate contended that the district court was not required to hear evidence presented for the first time in a party's objections, but that it was in the district court's discretion to consider such evidence. Id. The magistrate's reasons were:

> A. Counsel had ample time to respond to issues prior to the magistrate issuing its Report and Recommendations as counsel received two extensions of time to reply to the Motion to Dismiss. Appendix F21.
>
> B. Ms. Nelson was represented by counsel since 1995 and "the conduct of Petitioner's counsel is inconsistent with the orderly administration of justice and proper regard for the dignity of judicial proceedings." Appendix F21.
>
> C. It was not simply that Ms. Nelson presented new evidence in her Objections but that the new evidence "contradicts and [was] inconsistent with the factual positions" taken by Ms. Nelson in her Response to the Motion to Dismiss, and Supporting Declarations, filed April 21, 2003. Appendix F21.
>
> D. Ms. Nelson has been represented by her present counsel for about 8 years in the post-judgment collateral review process and was not pro se as was Brown in Brown v. Roe, 279 F.3d 742 (9th Cir. 2002). Appendix F21-F22.
>
> E. Dr. Estner's Supplemental Declaration does not add credibility to Ms. Nelson's position but rather detracts from it because Dr. Estner has not seen Ms. Nelson since August of 1998 nor has he reviewed any of her records since that date. Appendix F22. Therefore, the magistrate

"[b]ased on the absolute lack of any evidence to support [his] conclusion, . . . accords no credibility to Dr. Estner's current assertion." Appendix F22.

F. The Doctrine of Equitable Tolling was inapplicable here as Ms. Nelslson's argument regarding "her ignorance of the law and lack of legal sophistication" was defeated by the fact that she had legal counsel. Appendix F23. Furthermore, such an argument does not constitute "'extraordinary circumstances' warranting equitable tolling." Id.

For these reasons the magistrate denied Ms. Nelson's habeas corpus as being filed untimely.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"[T]he threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir 2002) (attorney miscalculation of due date did not trigger equitable tolling). Even in circumstances in which equitable tolling might otherwise be appropriate, the petitioner may not rely on the doctrine to excuse his or her own lack of diligence. See Guillory v. Roe, 329 F.3d 1015 (9th Cir 2003) (although district court erred in denying petitioner's motion to strike unexhausted portions of petition, petitioner was not entitled to equitable tolling because he waited for three years before attempting to exhaust

unexhausted claims).

The Ninth Circuit has held, in a case in which there was a genuine question about the petitioner's mental capacity, that the district court properly applied the doctrine of equitable tolling to toll the statute of limitations until a reasonable period after the court made its competency determination. Calderon v. U.S. Dist. Court, 163 F.3d 530, 542 (9th Cir 1998), overruled on other grounds in Woodford v. Garceau, 538 U.S. 202, 123 S.Ct 1398, 155 L.Ed.2d 363 (2003). See also Herbst v. Cook, 260 F.3d 1039, 1043 (9th Cir 2001) (district court erred in dismissing petition as untimely without giving petitioner adequate opportunity to develop facts when petitioner alleged facts supporting claims of equitable tolling and state-created impediment to filing).

"A criminal defendant may not be tried unless [sh]e is competent" Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) citing Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, *to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.*" Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) citing Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L.Ed.2d 103 (1975) (emphasis added).

"The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances,

be sufficient." Drope v. Missouri, 420 U.S. 162, 180, 95 S. Ct. 896, 43 L.Ed.2d 103 (1975). "In Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788 4 L.Ed.2d 824 (1960) (per curiam), [this Court] held that the standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

"[This Court has] repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.' [citations omitted]. Nor is the significance of this right open to dispute. As Justice Kennedy recently emphasized: 'Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. [citations omitted]" Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996)

"Indeed, the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination. See Pate v. Robinson, 383 U.S. 375, 384, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)." Cooper v. Oklahoma, 517 U.S. 348, 354 n.4, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996)

Ms. Nelson's mental disorder interfered with her ability to assist her habeas corpus counsel and her mental disorder interfered with habeas corpus counsel's ability to fully exercise due diligence in

the preparation of her constitutional claims that are the basis of her habeas corpus petition. 28 U.S.C. §2244(d)(1); Laws v. Lamarque, 351 F.3d 919 (9th Cir. 2003). In addition, it is claimed that the district court narrowly applied the requirements of 28 U.S.C. §2244 by stating that

> "[i]t is only in 'rare instances' that, pursuant to §§2244 (d)(1)(B)-(D), 'the limitation period may run from a date later than the date on which judgment becomes final.' Baker v. State of California, 2000 WL 74071 at *1 (N.D. Cal. 2000). In the Motion to Dismiss, Respondent contends that the running of the limitations period in this case is governed by §2244(d)(1)(A). Petitioner, however, seeks a later start date based on §2244(d)(2)." October 17, 2003, Amended Report and Recommendation of United States Magistrate Judge, pages 10-11. See Appendix F9.

Ms. Nelson's mental disorder and the application of equitable tolling create questions of law as to the interpretation of 28 U.S.C. §§2244 and 2254 and its application to the denial of Ms. Nelson's petition for Writ of Habeas Corpus, and these questions of law should be reviewed *de novo* by this Court. Villafuerte v. Stewart, 111 F.3d 616, 622 (9th Cir. 1997); United States v. Miguel, 111 F.3d 666, 669 (9th Cir. 1997); United States v. Workinger, 90 F.3d 1409, 1412 (9th Cir. 1996); Laws v. LaMarque, 351 F.3d 919, 922 (9th Cir. 2003); Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003); United States v. Battles, 362 F.3d 1195, 1196 (9th Cir. 2004).

STATEMENT OF THE CASE

Omaima Nelson suffers from a mental disorder that made her mentally incompetent at the time the offense was committed, at the time of her trial, and during the period of time her habeas corpus petition was being prepared. California Penal Code §1367(A). Ms. Nelson, by and through her counsel, Roger T. Nuttall, Nuttall & Coleman, referred to herein as "habeas corpus counsel," requests that the Order issued on April 30, 2004, be withdrawn and a rehearing granted. The United States Magistrate Judge did recognize a certain period of equitable tolling, but felt that there was not sufficient evidence to show equitable tolling should extended beyond July 1, 1998 to bar the one-year statute of limitations of §2244(d)(1).

Ms. Nelson's family was concerned about the final outcome of the trial and hired habeas corpus counsel to conduct an investigation, and to prepare the necessary legal documents in order to have her case reviewed. However, Ms. Nelson's mental disorder impaired the preparation of her habeas corpus claims. The amount of delay which Ms. Nelson's mental disorder caused in the preparation of her legitimate claims resulting in a tolling of the statute of limitations has been a disputed matter at the United States District Court level. Unless this Court recognizes that Ms. Nelson's mental disorder caused the delay in habeas corpus counsel's ability to fully exercise due diligence such that equitable tolling may protect her rights to pursue her legitimate constitutional claims, those legitimate claims will become barred by the passage of time as noted in 28 U.S.C. §2244(d)(1). Once habeas corpus counsel has been allowed, through equitable tolling, to be granted a certificate of appealability, counsel will be able to show that Ms. Nelson's trial

counsel failed to investigate, and to present to the jury, the full extent and nature of her mental disorder. Such failure on the part of trial counsel resulted in the ineffective assistance of counsel resulting in Ms. Nelson's inability to present evidence to show she was less culpable than defendants who are without such mental disorder. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) citing Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

There were other unexpected factors that contributed to the delay in the preparation of Ms. Nelson's habeas corpus claim. In addition to Ms. Nelson's frequent and unexpected lapses of lucidity related to her mental disorder, Ms. Nelson's forensic doctor was not granted timely access to examine her, and this delayed the preparation of medical evidence of her mental disorder. Further, among other things, Ms. Nelson was moved to another prison facility, without notifying counsel of her transfer, which caused Ms. Nelson's doctor to be required to resubmit the documentation necessary for admittance into that facility. All of these factors contributed to the delay in filing the habeas corpus claims and represent legitimate reasons for this Court to allow equitable tolling to protect Ms. Nelson's rights.

REASONS FOR GRANTING THE PETITION

Petitioner's mental condition was an extraordinary circumstance beyond her control that interfered with the preparation of her habeas corpus. Habeas corpus counsel requests that this Court allow a rehearing to review the following issues:

1) Ms. Nelson's frequent, unexpected, and debilitating manifestations of her mental disorder continued to provide

equitable tolling during the investigation and preparation of the "application for State post-conviction or other collateral review" (§2244(d)(2)) such that the "1-year period of limitations" (§2244(d)(1)) shall not apply. In the alternative, Ms. Nelson's frequent, unexpected, and debilitating manifestations of her mental disorder should allow the application of § 2244(d)(1)(D) in the consideration of how the manifestations of her mental disorder interfered with habeas corpus counsel's "exercise of due diligence."

There were several references to Ms. Nelson's sporadic periods of incapacity in counsel's Response to the State of California's Motion to Dismiss the Writ of Habeas Corpus filed April 21, 2003. See Appendix J. Below is a list, in chronological order, which should help this Court understand that Ms. Nelson mental condition was not stable post-judgment.

A. In the latter part of 1995, some four years after the homicide occurred, interviews with Ms. Nelson were "difficult due to [her] particularly disorganized mental state" and Ms. Nelson unable to "fully cooperate or communicate with her present counsel due to her then-existing level of psychosis". Appendix J3.

B. In early 1996, "present counsel continued to visit periodically with [Ms. Nelson] to see if her mental state has improved enough" so that she could assist habeas counsel by "relat[ing] her recollection of the circumstances of the case". Appendix J4. Apparently, Ms. Nelson was not always able to assist counsel due to her fluctuating mental states.

C. In late 1996, Ms. Nelson was lucid enough so that habeas counsel "was able to gather enough information from [Ms. Nelson] so as to be able to contrast what [she] was able to remember, and not remember, with the trial transcript" in

order to prepare the instant writ. Appendix J4.

D. Around December of 1996, Ms. Nelson "started to become more lucid"– which indicates that at some point she was less lucid – and was "able to talk somewhat more about her recollection" of how her trial case was handled. Appendix J6.

E. In September of 1997, Ms. Nelson was "starting to become much more lucid" which again indicates that at some point earlier she was less lucid. Appendix J7.

F On May 13, 1998, Ms. Nelson appeared to be "psychotically paranoid" when she "refused to be examined by Dr. Estner". Appendix J8. Apparently, Ms. Nelson condition deteriorated between September of 1997 and May 13, 1998 – a period of approximately eight months.

G. Although Ms. Nelson "cooperated fully with Dr. Estner" during his examination on May 21, 1998, this is not indicative that her condition improved; rather, it only shows that she was willing to be examined by Dr. Estner. Appendix J9.

H. Contrary to the Magistrate's assertion that "[i]t is reasonable to conclude, therefore, that by July 1, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of he habeas petition" (Appendix F18), there is no indication that Ms. Nelson's condition was lucid and stable by July 1, 1998. In fact Ms. Nelson's condition was not observed by Dr. Estner (nor habeas counsel?) between May 21, 1998, and August 27, 1998, when he "examined [her] for a second time". Appendix F19 and H5. Therefore, there is no basis to believe that Ms. Nelson was capable of assisting habeas counsel by July 1, 1998.

I. Ms. Nelson "lacked the mental capacity to reason or assist habeas counsel in her defense". Appendix J14. After her conviction, she received "psychiatric treatment" which "improved her mental condition enough to assist in her defense", but the improvement in her mental condition was sporadic. Appendix J14. This improvement had "only occurred since late 1997" strongly indicating that Ms. Nelson's mental incapacity continued post-judgment. Id.

J. Ms. Nelson's fluctuating mental condition with intermittent periods of lucidity or insensibility, based upon medical records and expert opinions, has made it "clear... that [she] was incompetent to assist in her own defense, assist counsel in the preparation of a writ of habeas corpus, much less understand and undertake preparation of a Petition of Writ of Habeas Corpus". Appendix J17.

and

2) Since Ms. Nelson's trial counsel, on his own accord and without Ms. Nelson's consent, decided not to assert the complete defense of Not Guilty by Reason of Insanity even though the trial judge expressly recognized that there was expert opinion on the trial record to support the claim, Petitioner's fundamental rights were violated at that time. Petitioner's trial counsel did not make "reasonable investigatio[n]". Wiggins v. Smith, 539 U.S. 510, 522, 123 S.Ct. 2527; 156 L.Ed.2d 471 (2003). Ms. Nelson endured the horrific procedure of female genital mutilation at a very young age. The trauma of this procedure has had an life-long effect on her mental state. Due to Ms. Nelson's chaotic mental state, it has been extremely difficult, and at times impossible, to communicate with her. Without her input, habeas corpus factors were impossible to investigate (e.g., ineffective assistance of counsel regarding her not guilty by reason of insanity defense, her alleged waiver of such a defense). By

applying the standard(s) in Wiggins v. Smith, Ms. Nelson's time limitation period should actually begin to run from the date of the Wiggins decision on June 26, 2003. 28 U.S.C. §2244(d)(1)(C) and Wiggins v. Smith, 539 U.S. 510; 123 S.Ct. 2527; 156 L.Ed.2d 471 (2003).

CONCLUSION

On two very significant occasions, Omaima Nelson's mental state should have been the subject of serious consideration. However, on both occasions, Ms. Nelson's actual mental state was not given serious consideration and was not the basis of the ultimate decision. Her actual mental state was disregarded.

In the first instance, at the trial, when the judge expressed serious concerns about Ms. Nelson's mental state, her trial counsel stated that he did not want her to spend the rest of her life in a mental institution, and as a result, no action was taken on her behalf with respect to her mental state, and no evidentiary hearing(s) was held. This was notwithstanding the fact that at the time of her trial, mental health experts had examined the petitioner and came to the conclusion that several mental health issues existed, including her competency.

After her conviction, when Ms. Nelson's habeas corpus counsel sought relief before the United States District Court, the magistrate denied her claim. The magistrate ultimately stated that according to her calculations, habeas corpus counsel had waited two months longer than the AEDPA would allow, and as a result, the subject of Ms. Nelson's mental state was again not considered, no action was allowed to be taken on her behalf, and no evidentiary hearing was held.

When Ms. Nelson's request to allow equitable tolling to

protect her claim was denied, the magistrate's calculation was based upon a statement which had been made by her habeas corpus counsel that she was, at some point, improving. The magistrate disregarded the statements of mental health experts and appears to have relied upon what amounted to a passing statement made by habeas corpus counsel, at some point in the process, that Ms. Nelson's mental state was improving. Obviously, counsel has no special training in treating or diagnosing mental illness; indeed, the statement was only counsel's observation that at a certain point in time, Ms. Nelson was becoming more responsive and helpful. It was after the point in time of counsel's observation that Ms. Nelson was examined and determined to be still suffering significantly from her mental illness. Ms. Nelson has subsequently received treatment for her mental illness and she has been responsive to this treatment.

Clearly, Omaima Nelson's mental illness has interfered with her ability to assist her trial counsel, and has interfered with her ability to assist her habeas corpus counsel. Her constitutional right to a fair trial, as yet, has not been fully provided. This Court, on several occasions, has addressed the concerns raised by Ms. Nelson's mental illness in Dusky v. United States, Drope v. Missouri, Pate v. Robinson, Godinez v. Moran, and Cooper v. Oklahoma; however, in this instance, unless this Court recognizes that Omaima Nelson's mental illness should allow equitable tolling to protect her claims, she will never have an opportunity to completely exercise the considerable rights which have been recognized by this Court.

For the foregoing reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari be granted.

No. _____

IN THE

Supreme Court of the United States

OMAIMA NELSON,
Petitioner - Appellant,

- VS. -

GWENDOLYN MITCHELL,
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Respondent - Appellee.

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PETITION FOR WRIT OF CERTIORARI

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OMAIMA NELSON,
Petitioner - Appellant,

v.

GWENDOLYN MITCHELL,
Respondent - Appellee.

No. 04-55124
D.C. No. CV -02-00615-CAS
Central District of California, Santa Ana

ORDER

Filed June 1, 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: KOZINSKI and SILVERMAN, Circuit Judges.

Petitioner's motion for reconsideration is denied. See 9th Cir. R. 27-10. No further filings shall be accepted in this closed docket.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OMAIMA NELSON,
Petitioner - Appellant,

v.

GWENDOLYN MITCHELL,
Respondent - Appellee.

No. 04-55124
D.C. No. CV-02-00615-CAS
Central District of California, Santa Ana

ORDER

Filed April 30, 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: TROTT and T.G. NELSON, Circuit Judges.

The request for a certificate of appealability is denied.

See 28 U.S.C. § 2244(d)(1).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent.

No. SA CV 02-00615-CAS (VBK)

ORDER

DENYING CERTIFICATE OF APPEALABILITY

Filed January 5, 2004
Clerk, U.S. District Court
Central District of California
By Deputy

On December 19, 2003, Petitioner filed a "Petition for Certificate of Appealability" and a "Notice of Appeal" of the Judgment entered herein on November 24, 2003.

Under 28 U.S.C. §2253(C)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." After review of Petitioner's contentions herein, this Court concludes that Petitioner has not made a substantial showing of the denial of a constitutional right, as is required to support the issuance of a

Certificate of Appealability. See 28 U.S.C. §2253(C)(2).

Accordingly, the Application is DENIED.

DATED: December 31, 2003

"s/CHRISTINA A. SNYDER",
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

Presented this 30th day of December, 2003 by:
"s/VICTOR B. KENTON"
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent.

No. SA CV 02-00615-CAS (VBK)

ORDER

JUDGEMENT

DENYING PETITION AND DISMISSING PETITION WITH PREJUDICE

Filed November 24, 2003
Clerk U.S. District Court
Central District of California
By: "s/[illegible]" Deputy
Entered November 25, 2003
Clerk U.S. District Court
Central District Court of California
By: "s/[illegible]" Deputy

Pursuant to the Order Accepting and Adopting the Amended Report and Recommendation of the United States

Magistrate Judge, and dismissing the Petition for Writ of Habeas Corpus ("Petition") with prejudice,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: November 17, 2003

"s/CHRISTINA A. SNYDER",
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent(s).

No. SA CV 02-00615-CAS (VBK)

ORDER
(1) ACCEPTING AND ADOPTING
THE AMENDED REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE, AND
(2). DISMISSING THE PETITION
FOR WRIT OF HABEAS CORPUS

Filed November 24, 2003
Clerk U.S. District Court
Central District of California
By: "s/[illegible]" Deputy
Entered November 25, 2003
Clerk U.S. District Court
Central District Court of California
By: "s/[illegible]" Deputy

Pursuant to 28 U.S.C. §636, the Court has made a de novo review of the Petition for Writ of Habeas Corpus ("Petition"), Respondent's Motion to Dismiss, Petitioner's

Response to Motion to Dismiss, all of the records herein and the Amended Report and Recommendation of the United States Magistrate Judge.

IT IS ORDERED that: (1) the Court accepts and adopts the Amended Report and Recommendation, (2) Respondent's Motion to Dismiss is GRANTED, and (3) Judgment be entered denying and dismissing the Petition with prejudice.

DATED: November 17, 2003

"s/CHRISTINA A SNYDER"
CHRISTINA A SNYDER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent(s).

No. SA CV 02-00615-CAS (VBK)

AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Filed October 17, 2003

This Amended Report and Recommendation is submitted to the Honorable Christina A. Snyder, United States District Judge, pursuant to the provisions of 28 U. S. C. §636 and General Order 01-13 of the United States District Court for the Central District of: California.

INTRODUCTION

On May 20, 2002, Omaima Nelson (hereinafter referred to as "Petitioner"), a California state prisoner represented by counsel, filed a "Petition for Writ of Habeas Corpus by a Person in State Custody," pursuant to 28 U.S.C. §2254 ("Petition"), in the United States District Court for the Eastern District of California. On June 24, 2002, an Order of Transfer was issued by United States Magistrate Judge Lawrence J. O'Neill of the Eastern District of California, transferring the Petition to the

United States District Court for the Central District of California.

On July 1, 2002, the Petition was filed in the United States District Court for the Central District of California. On July 2, 2002, the Court issued an Order dismissing the Petition with leave to amend as the Petition was not filed on the proper form utilized by Local Rule 26.1 of the United States District Court for the Central District of California. On November 7, 2002, Petitioner filed a First Amended Petition. Respondent filed a Motion to Dismiss ("MTD") on January 16, 2003, contending that the Petition was barred by the one--year statute of limitations set forth in 28 U.S.C. §2244(d)(1) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). On January 22, 2003, the Court issued a Minute Order ordering Petitioner to file an Opposition or Statement of Non--Opposition. Petitioner filed an Opposition to the Motion to Dismiss on April 21, 2003.

For the reasons set forth below, it is recommended that the Motion to Dismiss be granted and that the Petition be dismissed with prejudice as untimely.

PRIOR PROCEEDINGS

On January 12, 1993, Petitioner was convicted by a jury in Orange County Superior Court of one count of second-degree murder in violation of California Penal Code §187 and assault with a firearm in violation of California Penal Code §12022(b). Petitioner was sentenced to a total sentence of 27 years to life. (See First Amended Petition at 3)

Petitioner appealed her conviction and on February 28, 1995 (sic) the Court of Appeal affirmed the judgment of

conviction and sentence in its entirety. (See First Amended Petition at 3) On April 6, 1995, Petitioner filed a Petition for Review in the California Supreme Court which was denied on May 31, 1995.

Petitioner filed a Petition for Writ of Habeas Corpus in the Orange County Superior Court on September 21, 1999. The Orange County Superior court denied that petition on October 20, 1999.

On March 8, 2000, Petitioner filed a Petition for Writ of Habeas Corpus in the California Court of Appeal. On August 31, 2000, in an unpublished opinion, the California Court of Appeal granted, in minor part, the petition for Writ of Habeas Corpus, ordering that the Penal Code §12022.1, two-year enhancement be vacated. In its ruling, the Court of Appeal stated, "[I]n her recently filed petition for a writ of habeas corpus, Nelson raised numerous issues, only one of which we have found might have merit." On November 30, 2000, Petitioner filed a Petition For Writ of Habeas Corpus in the California Supreme Court. On. May 23, 2001, the California Supreme Court denied the petition.

The within Petition was filed on May 20, 2002.

STATEMENT OF FACTS

The statement of facts is taken from the California Court of Appeal opinion:

> "[Petitioner] spent Thanksgiving weekend of 1991 killing, decapitating, dismembering, disemboweling, cooking, and freezing William Nelson, her husband of four weeks . . . ."
>
> By her own report, [petitioner] was the victim of almost

unimaginable abuse as a child in Egyp[t. The report states that over the Thanksgiving weekend. The police investigation report is on discussed on page 4.] A partial arm and two partially cooked hands were found, but many parts c)f the victim were never located. The total weight of the body parts found was only about 100 pounds. In life, William had weighed 230.

The Police found the couple's bloody mattress flipped over so that the bloodstained side was facing the floor. A second bloodstained mattress was standing against a bedroom wall and a pool of blood was underneath the bed. Bloodstained sheets, still wet, were in a basket near the bed. Neckties were discovered, tied together so as to suggest that they had been used as ligatures along with belts and electrical cords with blood on them. Circular discolorations above the victim's ankles indicated he had been tied up prior to death.

The bedroom and bathroom walls and the bed's headboard had been recently washed. Tests of these areas confirmed the presence of blood. Some two dozen knives, several with blood on them, were found in the apartment along with trash bags. A test of blood found on one knife handle: was consistent with the victim's blood type. An iron with the bottom metal plate broken off from the plastic upper portion was found in the bedroom closet. The plate was bloodstained and had hairs consistent with William's. His skull contained significant breaks consistent with being struck by the edge of an iron. The breaks would have been enough to stun a person or cause unconsciousness.

William's heart and left lung were recovered, and found to have stab and slash wounds. The forensic pathologist who conducted an autopsy of William's remains concluded he died from either stab wounds that cut his heart, left lung

or carotid artery, or blows to the head.

The day of her arrest, [Petitioner] accused William of sexually assaulting her Thanksgiving evening and was taken to a hospital for a rape examination. The purported assault included vaginal and rectal penetration with his penis and fingers. She also claimed William tied her hands, bit, kicked, grabbed and choked her and threatened to kill her.

The examining physician saw multiple contusions on [Petitioner's] body and multiple superficial lacerations on her chest, back, arms, feet and thighs that appeared to have occurred within the preceding two days. A treating nurse testified she did not observe any bite or ligature marks or bruising that indicated [Petitioner] had been choked. A visual exam of [Petitioner's] vagina and rectum did not indicate any tearing, bruising, bleeding or swelling associated with a sexual assault. No semen was found in her vagina or rectum or her underwear.

The prosecution presented evidence suggesting that [Petitioner] killed her husband to obtain his money and other property and accomplished the act by luring him into bed, tying him down and then stabbing and bludgeoning him. The defense focused on [Petitioner's] state of mind when she killed William. [Petitioner] testified about her life experiences with abuse. She claimed Richard Gray [she had a relationship with Richard Gray between approximately 1988 and 1990] frequently beat her when she lived with him, and said that while her relationship with William had started off well, it had degenerated into a cycle of physical and sexual abuse.

She said that on Thanksgiving, both of them were drinking and she was taking Valium. William asked her to engage in anal sex and bondage. Petitioner said she

handcuffed her husband to a chair at his request, but then refused his sexual demands, and he later sexually assaulted her, sitting on top of her and forcing her to orally copulate him. On Friday, [Petitioner] threatened to leave and he apologized and promised not to hurt her any more.

But [Petitioner] testified the physical abuse and sexual assaults started again Saturday afternoon. [Petitioner] testified William forced her onto the bed, claiming he was going to rape her and demanding she orally copulate him. He pulled out a pocket knife and cut her on the breast; he tied her hands behind her back, inserted his fingers into her rectum and covered her mouth to prevent her from screaming. Fearing for her life, she freed one hand, grabbed a nearby pair of scissors and stabbed William in the chest and the neck, struck him with an iron, and threw a lamp at him.

[Petitioner] denied intending to kill William or planning to take his money. She claimed to have very little memory of his dismemberment, but recalled cutting off his penis and his ring finger, cleaning the apartment, and packaging the body parts.

The defense presented the testimony of two mental health experts. Dr. David Sheffner, psychiatrist, conducted four interviews with [Petitioner]. He concluded she was suffering from a chronic psychosis, probably a form of schizophrenia and that the psychosis existed before she killed William. Dr. Nancy Kaser-Boyd, a clinical psychologist who spent 20 to 25 hours with [Petitioner], diagnosed her as suffering from post traumatic stress disorder and said she also fit the definition of a psychotic."

(California Court of Appeal Opinion at pp. 2-6.)

PETITIONER'S CONTENTION'S

Petitioner contends the following, inter alia:

1. Violation of constitutional right to due process by failing to instruct on unconsciousness defense;

2. Violation of constitutional right to due process by failing to instruct the jury on evidence of mental disease as to the inability to form specific intent;

3. Violation of constitutional right to due process by failure to consult with Petitioner regarding a not guilty by reason of insanity plea;

4. Violation of constitutional right to due process by denying Petitioner the right to be present at all important stages of the proceedings;

5. Violation of constitutional right to due process by failing to hold a competency hearing in light of the substantial evidence of Petitioner's psychosis;

6. Ineffective assistance of counsel;

7. Trial court violated constitutional right to due process by causing a 17-day delay in giving jury instructions after closing arguments;

8. Trial court violated Petitioner's right to due process by failing to present adequate instruction of defense of battered woman syndrome; and,

9. Ineffective assistance of counsel.

(See First Amended Petition at 4-78)

DISCUSSION

In the Motion to Dismiss, Respondent contends that the Petition should be dismissed on the ground that the Petition is untimely.

A. The Petition Is Facially Untimely.

Since the Petition was filed after the President signed into law the AEDPA on April 24, 1996, the Court's consideration of the Petition's timeliness is governed by 28 U. S. C. §2244 (d), as amended by the AEDPA. See Calderon v. United States District Court for the Central District of California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), cert. denied, 522 U.S. 1099 and 523 U.S. 1061 (1998)[1]. That section provides:

> "(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:
>
> (A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or,
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

---

1 Beeler was overruled on other grounds in Calderon. v. United States District Court (Kelly), 163 F. 3d 530, 540 (9th Cir. 1998) (en bane). cert. denied, 119 S. Ct. 1377 (1999).

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

In most instances, a state prisoner's AEDPA limitations period will be governed by §2244 (d) (1) (A). It is only in "rare: instances" that, pursuant to §§2244 (d) (1) (B) - (D), "the limitation period may run from a date later than the date on which judgment becomes final." Baker v. State of California, 2000 WL 74071 at *1 (N.D. Cal. 2000). In the Motion to Dismiss, Respondent contends that the running of the limitations period in this case is governed by §2244 (d) (1) (A).

Petitioner, however, seeks a later start date based on §2244(d) (2).

1. Application Of §2244 (d) (1) (A) Renders The Petition Facially Untimely.

Under §2244 (d) (1) (A), the statute began to run at the completion of direct review in the state courts. Here, the Court of Appeal affirmed Petitioner's conviction on February 28, 1995. Petitioner filed a Petition for Review in the California Supreme Court on April 6, 1995, which was denied on May 31, 1995. Consequently, the judgment became final on August 30, 1995, when Petitioner's time to petition the United states Supreme Court for a writ of certiorari expired.[2] Bowen v. Roe, 188 F.3d

[2] Per United States Supreme Court Rule 13.1, Petitioner had 90 days from the date of the Order denying her Petition for Review became final to petition the Supreme Court for a writ of certiorari.

1157,1158-59 (9th Cir. 1999).

However, prisoners, like Petitioner, whose convictions became final prior to the enactment of AEDPA, had until its one-year anniversary date, April 24, 1997, in which to file a federal habeas petition. Patterson v. Stewart, 251 F.3d 1243-45 (9th Cir. 2001). Here, Petitioner filed her federal Petition on May 20, 2002. The Petition was filed five years beyond the one-year anniversary date, and is therefore facially untimely unless petitioner is entitled to statutory or equitable tolling.

B. Petitioner Is Not Entitled To Statutory Tolling.

The running of the AEDPA's one-year time limitation is tolled for the time period during which a properly filed application for post-conviction or other state collateral review is pending in state court. See 28 U.S.C. §2244(d)(2); Duncan v. Walker, 531 U.S. 991, 121 S.Ct. 2120 (2001) (The statutory term "other collateral review" refers to other state collateral review). The statute is tolled from "the time the first state habeas was filed until the California Supreme Court rejects the petitioner's final collateral challenge." Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir.), cert. denied, 529 U S. 1104, 120 S. Ct. 1846 (2000); accord, Welch v. Newland, 267 F.3d 1013 (9th Cir. 2001).

Continuous tolling applies, however, only for "the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." Nino, 183 F.3d at 1006, quoting Barnett v. LeMaster, 167 F.3d 1321,

1323 (10th Cir. 1999). "This tolled period included intervals between the disposition of a state court petition and the filing of a subsequent petition at the next state appellate level." Welch, 267 F.3d at 1016. A state habeas petition will remain "pending" within the meaning of AEDPA during the interval between a lower court's entry of judgment and the timely filing of a new habeas petition in a higher state court. Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134, 2139-41 (2002).

Here, Petitioner's counsel filed a habeas petition in the Orange County Superior Court on September 21, 1999. It was denied on October 20, 1999. Petitioner filed a habeas petition on March 8, 2000 in the California Court of Appeal which was denied on August 31, 2000. Petitioner also filed a habeas petition in the California Supreme Court on November 30, 2000, which was denied on May 23, 2001. These petitions were filed approximately three and one-half years too late. State habeas petitions filed in state courts after the expiration of the period of limitations do not revive the filing period. Jimenez v.Rice, 276 F.3d 478, 481 (9th Cir. 2001); Green v. Rice, 223 F.3d 1001, 1003 (9th Cir. 2000). Thus, Petitioner is not entitled to statutory tolling.

C. Petitioner Is Not Entitled To Relief Based on Equitable Tolling.

1. Factual Contentions.[3]

Petitioner contends she is entitled to equitable tolling based on her

[3] Petitioner's factual contentions in support of her argument for equitable tolling are contained in her response to the State of California's Motion to Dismiss the Writ of Habeas Corpus. Unless otherwise noted, all page and exhibit citations are in reference to that Response.

serious mental problems, her sexual abuse since childhood, slavery, forced drug use and prostitution.

Petitioner retained her present habeas counsel on August 5, 1995. (Page 2) In 1995, Petitioner's counsel reviewed the trial transcripts, appellate briefs, and other materials "relative to the appeal of this case." (page 3) Although counsel interviewed Petitioner during the latter part of 1995, he asserts these interviews were difficult due to Petitioner's "particularly disorganized mental state..." (Page 3) Counsel asserts that Petitioner demonstrated an inability to fully cooperate or communicate with counsel due to her mental state. (Id.) Counsel asserts that although Petitioner was "getting better" during early 1996, he was still experiencing communication problems with her during that time period. (Page 4) In October 1996, Petitioner's counsel met with Dr. Nancy Kaser-Boyd, a forensic psychologist (see Ex. D, Dr. Kaser-Boyd's Declaration), and Dr. Theresa Farjalla, who had been Petitioner's treating doctor while she was in custody prior to and during her trial. (Page 5)

In a later meeting with Petitioner in October 1996, counsel was able to gather sufficient information from her "so as to be able to contrast what Petitioner was able to remember, and not remember, with the trial transcript." (Id.) During this period of time, Petitioner's habeas counsel was seeking various medical, psychological and psychiatric reports from Petitioner's trial counsel. (Page 6) In late 1996, Petitioner started to become more lucid, and she was able to communicate more with her counsel about issues pertaining to the waiver of her insanity defense at her trial. (Page 6)

In July of 1997, petitioner's habeas counsel received all of

the materials which he had been seeking from petitioner's trial counsel. In September 1997, Petitioner's counsel asserts unconsciousness and the insanity defense, and in order to obtain additional expert support, counsel in 1998 retained Dr. Miles Estner, a forensic psychiatrist. Dr. Estner was retained "to advise counsel on the viability of the unconsciousness and insanity defenses." (Page 8; see also Dr. Estner's Declaration at Ex. C)

On May 13, 1998, habeas counsel and Dr. Estner visited Petitioner at her custodial facility. Petitioner appeared to by psychotically paranoid and refused to be examined by Dr. Estner, according to counsel. (Page 9) At the next examination on May 21, 1998, Petitioner cooperated fully with Dr. Estner. (Id.)

Petitioner's counsel asserts that Petitioner lacked experience or education in law, and also lacked the mental capacity to reason or assist habeas counsel in her defense. (Page 15) Significantly, Petitioner's counsel states that,

> "At present, however, Petitioner through her efforts of self-education, psychiatric treatment, devoted prayer, and the love and support of her new husband, has improved her mental condition enough to assist in her defense. This has only occurred since late 1997." (Page 15, emphasis added)

Petitioner's counsel also asserts:

> "It is clear from the medical records, and opinions of medical experts that the Petitioner was incompetent to assist in her own defense, assist counsel in the preparation of a writ of habeas corpus, much less understand and undertake the preparation for a Petition For A Writ of Habeas Corpus until mid 1998 at the earliest. Thus, 'equitable tolling' is appropriate until such time as the Petitioner became competent." (Page 18)

Petitioner has also submitted the Declaration of Dr. Estner in support of her equitable tolling argument. (See Ex. C) In his Declaration, Dr Estner asserts that petitioner suffers from a Dissociative Disorder or a form of Post-Traumatic Stress Disorder. (Ex. C at 1) Dr. Estner states that he visited Petitioner on May 13, 1998, accompanied by habeas counsel, but that Petitioner "appeared to psychotically paranoid and refused to be examined by me." (Ex, C at 2) He notes that he next saw Petitioner on May 21, 1998, at which time he was able to examine her. (Id.)

In his Declaration, Dr. Estner renders his professional opinion as to Petitioner's mental state at the time of the offense (See Ex. C, at 3), but, significantly, fails to render any opinion as to whether Petitioner was, at any time following judgment, incapable of assisting habeas counsel in preparing the Petition.

Similarly, Petitioner submits the Declaration of forensic psychologist Dr. Nancy Kaser-Boyd. (see Ex. D) Dr. Kaser-Boyd states that she examined Petitioner 7 times over 25 hours while Petitioner was awaiting trial, but does not indicate that she has seen Petitioner since the trial. Nevertheless, Dr. Kaser-Boyd opines that Petitioner was deeply psychotic at the time of the incident, and most likely for at least several weeks following the incident. (See Ex. D at 1) Dr. Kaser-Boyd renders no opinion as to whether Petitioner was incapable of assisting her habeas counsel at any time following the judgment.

On October 10, 2003, Petitioner filed Objections to the Report arid Recommendation along with a "Supplemental Declaration of Roger T. Nuttall ('Supplemental Nuttall

Declaration')" and a "Supplemental Declaration of Dr. Miles Estner ('Supplemental Estner Declaration')." In the Supplemental Nuttall Declaration, Petitioner's counsel does not contradict his earlier contention as to when Petitioner was competent to assist in the preparation of the Petition ("As counsel for the Petitioner, your Declarant has always maintained that the Petitioner herein was incompetent to assist . . . in the preparation of the Petition. . . until at least Mid-1998, at the very earliest; . . ." [Supplemental Nuttall Declaration, at 4] [emphasis in original]). In the Supplemental Estner Declaration, Dr. Estner states that, following the filing of the Report and Recommendation, Petitioner's attorney contacted him and asked him to review his file to form a professional opinion as to whether or not petitioner was competent to assist in the preparation of the Petition after mid-1998. (See Supplemental Estner Declaration, at 3) Dr. Estner does not contradict his earlier Declaration, in which he stated that he visited petitioner on three occasions: May 13, 1998, May 21, 1998, and August 27, 1998 (see Declaration of Dr .Miles Estner, Ex. C to Petitioner's Response to Motion to Dismiss, at 6, 7, and 9). Further, in his Supplemental Declaration, Dr. Estner does not assert that he has examined Petitioner at any time after August 27, 1998, nor does he declare that he has reviewed any medical or mental health records, or any other records which would concern or document Petitioner's mental condition at any time after August 27, 1998. Nevertheless, Dr. Estner opines that, "[I]t is highly likely that the Petitioner, during the years 1998 and 1999, based upon her incompetency, lacked the-consistent ability to rationally assist [Petitioner's counsel] in the preparation of her Habeas Corpus Petition." (Supplemental Estner Declaration, at 5)

2. Applicable Law And Analysis.

The AEDPA's limitations period may be subject to equitable tolling if a petitioner can demonstrate that "extraordinary circumstances" exist which justify such tolling. See, Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc), cert. denied, 119 S.Ct. 1377 (1999); Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1287-89 (9th Cir. 1997). However, equitable tolling is unavailable in most cases. See, Corjasso v. Avers, 268 F.3d 874 (9th Cir. 2002); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). In the Ninth Circuit, one of two circumstances must exist before equitable tolling may apply: (1) The Respondent's wrongful conduct somehow has prevented the habeas petitioner from asserting his or her claims; or (2) extraordinary circumstances beyond the Petitioner's control made it impossible to file the claims on time. Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996). See also Beeler, 128 F.3d at 12 88-89 (equitable tolling will not be available in most cases as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time).

In Ross v. Hickman, 2001 WL 940911 *2 (N. D. Cal.) the District Court held, "Mental incompetency may equitably toll the AEDPA's limitation period because mental incompetency is an extraordinary circumstance beyond a prisoner's control." See Kelly, 163 F.3d at 541. But a showing of mental illness alone will not toll the limitation period. Under federal common law, mental illness tolls a limitation period only if 'the illness in fact prevents

the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them.' Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996)." The Petitioner in Ross alleged that his mental illness prevented him from functioning on a sufficiently normal level. The Ross Court found that Petitioner's alleged enrollment in a prison mental health program and receipt of psychotropic medication did not in of itself establish that he was mentally incompetent.

"Most mental illnesses are treatable, and with proper treatment many, if not most, sufferers are capable of managing their own affairs." See Miller v. Runyon, 77 F. 3d at 192. In order to overcome the limitation barrier, petitioner must show that mental illness or other disability rendered her incapable of filing a habeas petition before the limitation period expired. Rhodes v. Sennkowski, 82 F.Supp.2d 160, 169-70 (S.D.N.Y. 2000) (prisoner must show that medical/mental problems rendered him unable to pursue his legal rights during relevant time period). The petitioner in Kelly made a substantial showing of mental illness which was documented in a report listing extensive behavioral manifestations of the petitioner's illness and a psychiatrist's conclusion that the severity of the petitioner/s mental disorder precluded his capacity to appreciate his current legal position and make rational choices with respect, to court proceedings. See Kelly, 163 F.3d at 541 (citing Calderon v. United States District Court (Kelly), 127 F. 3d 782, 788 n. 1.)

This case is unlike Kelly, Petitioner's counsel contends that at the outset of his representation, in 1995, he was in possession of the trial transcripts as well as appellate briefs. Moreover, by July of 1997, counsel had received the medical, psychological and

psychiatric records which he alleges he had been seeking from trial counsel. Counsel concedes that as of late 1997 Petitioner's mental condition improved to the extent that she was able to assist in the preparation of her habeas petition. In another part of his argument, Petitioner's counsel contends that until mid-1998, Petitioner was incompetent to assist in preparation of the writ. It is reasonable to conclude, therefore, that by July 1, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of her habeas petition. Petitioner did not, however, seek collateral relief in the state court until she filed a Petition for Writ of Habeas Corpus in the Orange County Superior Court on September 21, 1999, a period in excess of one year after the latest date she was competent and able to assist her counsel in preparing a petition. Thus, even under the most liberal analysis, which gives full credit to her counsel's assertions as to Petitioner's competency, equitable tolling due to incompetency would have required that a petition be filed within one year of the date Petitioner became competent to assist her counsel. That date would be July 1, 1999. Since her first state habeas petition was filed after that date, Petitioner's cause cannot be aided by equitable tolling, since the one-year period provided by 18 U.S.C. §2244 (d) had already expired by the time Petitioner filed her first state habeas petition.[4]

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[4] Petitioner's reliance on Crawford v. Oregon State Hospital, 2002 WL 505943 (9th Cir. (Or.)) is misplaced. The petitioner in Crawford was not represented by counsel in the habeas proceeding, had been initially found incompetent to stand trial and was confined to the state hospital. The Court in Crawford, based on the record before it, was unable to determine whether Crawford's mental condition between the time his state habeas petition was dismissed and the time his AEDPA clock had run out had deteriorated enough to prevent him from timely filing a federal petition.

In her Objections, Petitioner contends that the new assertions set forth in the two supplemental declarations no longer permit the Court to conclude that by July 11, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of her habeas petition. The Court disagrees.

In the Supplemental Nuttall Declaration, Petitioner's counsel now asserts that it has been his consistent position that even at. the time of filing the Petition, "[T]he Petitioner still exhibited significant signs of mental incompetency which interfered with the preparation of the Habeas Petition; . . . " (See Supplemental Nuttall Declaration, at 10) Further, Petitioner's counsel asserts that even as of the present date, "Petitioner's ability to continue to assist in her legal matters is substantially hindered by such continuing mental difficulties; . . ." (Id., at 11) Despite the protestations of counsel to the contrary, these assertions directly contradict his assertions that by mid-1998 (which the Court has liberally construed as July 1, 1998), Petitioner was sufficiently mentally competent to assist in the preparation of the Petition. The current assertions of Petitioner's counsel are nothing more than backpedaling in an attempt to avoid the dismissal of the Petition due to untimely filing. Petitioner's counsel is taking fundamentally inconsistent positions in this litigation. Especially in view of the fact that these new contentions have surfaced for the first time in Petitioner's Objections, the Court concludes that the doctrine of judicial estoppel should be invoked here. The doctrine was succinctly stated in Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990):

"In her dissent to Religious Technology Center v. Scott,

869 F.2d 1306, 1311 (9th Cir. 1989) (citation omitted), Judge Hall sets forth the principles underlying judicial estoppel:

> The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. See 1B Moore's Federal Practice 405[8], at 238-42 (2d Ed. 1988). "The policies underlying preclusion of inconsistent positions are 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.'" Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1215 (9th Cir. 1984), cert. denied, 469 U.S. 1197, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985) (citations omitted). Judicial estoppel is 'intended to protect against a litigant playing fast and loose with the courts.'" Rockwell International Corp. v. Hanford Atomic Metal Trades Council, 851 F.2d 12.08, 1210 (9th Cir. 1988) (citations omitted). Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.
>
> ... Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one. See generally Note, Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 Geo.Wash.L.Rev. 409, 410-1:2 (1987); Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw.U.L.Rev.1244 (1986)."

Further, in this Circuit it is not mandatory that the Court consider evidence raised for the first time in a party's objections

to a Magistrate Judge's Report and Recommendation. See Brown v. Roe, 279 F.3d 742, 744 (9th Cir. 2002). Under the holding of Brown, the District Court must indicate whether it exercised its discretion in determining whether to consider such new evidence. Here, the Court declines to consider the new evidence in the Objections. The reasons for this are several. First, Respondent's Motion to Dismiss, filed on January 16, 2003, clearly argued that this Petition is untimely. As the Court noted in its Minute Order of September 16, 2003, Petitioner's counsel asked for, and received, two significant extensions of time to reply to the Motion to Dismiss. Thus, the Court concludes that Petitioner's counsel had extremely ample time and opportunity to respond to the issues raised in the Motion to Dismiss, yet failed to raise this purportedly new evidence until after the Court issued its Report and Recommendation. Especially in view of the fact that Petitioner has been represented by this counsel in post-judgment collateral review matters since 1995, the conduct of Petitioner's counsel is inconsistent with the orderly administration of justice and proper regard for the dignity of judicial proceedings. Moreover, the issue is not simply that Petitioner has raised new evidence in the Objections rather, the more significant point is that this new evidence contradicts and is inconsistent with the factual positions taken by Petitioner in her Response to the Motion to Dismiss, and Supporting Declarations, filed April 21, 2003. Further, the fact that Petitioner has been represented by her present counsel for approximately eight years in post-judgment collateral review matters distinguishes this case from Brown. In that case, the Ninth Circuit made it clear that a significant factor to be considered by a Court in determining whether to consider new

evidence filed for the first time in objections is whether the petitioner is pro se or is represented. The Petitioner in Brown was pro se, a point which the appellate court significantly underscored. Moreover, even with a pro se petitioner, the Court may still exercise its discretion not to consider new evidence raised for the first time in Objections. This case, however, is at the opposite end of that spectrum.

The Supplemental Estner Declaration adds no credibility to Petitioner's position, and in fact, detracts from it. Dr. Estner last saw Petitioner in August of 1998, when he visited her and conducted his second successful interview. Nevertheless, despite the fact that Dr. Estner has not seen Petitioner since August of 1998, and has not reviewed any relevant mental health or other records post-dating that interview (other than to state his understanding that she has not received "necessary [mental health] treatment" [see Supplemental Estner Declaration at 5]), Dr. Estner still opines that through 1998 and into 1999, Petitioner was incompetent to assist her counsel in his preparation of her Petition. Based on the absolute lack of any evidence to support this conclusion, the Court accords no credibility to Dr. Estner's current assertion.

Moreover, Petitioner's counsel misconstrues the doctrine of equitable tolling. Petitioner's counsel had more than adequate information in his possession to timely file a habeas petition. The record is clear that Petitioner's counsel had received all of the necessary transcripts and other evidence necessary to prepare a petition, and had successfully met with Petitioner and obtained information from her to timely prepare a petition. See, Flanagan v. Johnson, 154 F.3d 196,198-199 (5th Cir. 1998) ("Section

2244(d)(1)(D) does not convey a statutory right to an extended delay, . . . , while a habeas petitioner gathers every possible scrap of evidence that might, . . . , support his claim."); accord Ross v. Hickman, 2001 WL 940911 (N.D. Cal.); Hasan v. Galaza, 254 F.3d 1150, 1154, N.3 (9th Cir. 2001) (stating that the statute of limitations begins to run when a prisoner "knows or through diligence could discover the important facts, not when the prisoner recognizes their legal significance.")

Similarly, even if the Court were to consider that equitable tolling would apply due to the inability of Petitioner's counsel to obtain medical, psychiatric and psychological records[5], this would lend no support to Petitioner's argument that her federal petition is timely, because her counsel asserts that those records were received in July of 1997. Under that analysis, Petitioner's one-year period would have expired in July of 1998.

Petitioner also advances her ignorance of the law and her lack of legal sophistication. The fact that Petitioner has had legal counsel assisting her in collateral review proceedings since 1995 defeats that argument. In any event, it is firmly established that ignorance of the law and lack of legal sophistication do not constitute "extraordinary circumstances" warranting equitable tolling. See, e.g., Hood v. Galaza, 47 F.Supp. 2d 1144, 1148 (S.D. Cal. 1999); Harrisonv. Galaza, 1999 WL 58594 at *2

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[5] In United States v. Van Poyck, 980 F.Supp. 1108, 1110-11 (C.D. Cal. 1997), the Court found that a petitioner's circumstances were not (extraordinary in the following circumstances: inability to obtain transcripts from court reporters and general prison lockdowns. See also Fadayiro v. United States, 30 F.Supp.2d 772, 779-80 (D.N.J. 1998) (delay in receipt of transcripts does not justify equitable tolling).

(N.D. Cal. 1999); Atkins v. Harris, 1999 WL .13719 at *2 (N.D. Cal. 1999); Jones v. Galaz, 1998 WL 720638 at *2 (N.D. Cal. 1998); Bolds v. Newland, 1997 WL 732529 at *2 (N.D. Cal. 1997). "Ignorance of the law, even for an incarcerated pro se Petitioner, generally does not excuse prompt filing." Green v. Olivarez, 2000 WL 432818 at *2 (N.D. Cal. 2000).

Here, Petitioner has been represented by the same post-conviction counsel since 1995.[6] That Petitioner suffered from and was treated for mental illness in the past is not sufficient to show that mental illness rendered her unable to pursue her legal rights during the relevant time period. Petitioner is not entitled to equitable tolling because she has not met her burden of showing that mental illness or other disability was the "but for" and proximate cause of her untimeliness and that. her mental illness rendered her and her counsel incapable of filing a habeas petition before the statute of limitations expired. Thus, the Petition is untimely and should be dismissed.

RECOMMENDATION

For all the foregoing reasons, IT IS HEREBY RECOMMENDED that the District Court issue an order: (1) Approving and adopting this Amended Report and Recommendation; (2) Granting Respondent 's Motion to Dismiss; and (3) Directing that Judgment be entered denying and

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[6] In Miranda v. Castro, 292 F.3d 1063, 1068 (9th Cir. 2002), the Court held that counsel's mistake regarding habeas statute of limitations does not warrant equitable tolling. See also Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001), cert. denied, 535 U.S. 1055 (2002) (holding that miscalculation of the limitations period by counsel and counsel's negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling).

dismissing the Petition with prejudice.

DATED: October 17, 2003
"s/VICTOR B. KENTON"
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent(s).

No. SA CV 02-00615-CAS (VBK)

PROPOSED ORDER

(1) ACCEPTING AND ADOPTING
THE AMENDED REPORT AND RECOMMENDATION OF
THE UNITED STATES MAGISTRATE JUDGE, AND
(2) DISMISSING THE PETITION FOR
WRIT OF HABEAS CORPUS

Pursuant to 28 U. S. C. § 636, the Court has made a de novo review of the Petition for Writ of Habeas Corpus ("Petition"), Respondent's Motion to Dismiss, Petitioner's Response to Motion to Dismiss, all of the records herein and the Amended Report and Recommendation of the united States Magistrate Judge.

IT IS ORDERED that: (1) the Court accepts and adopts the Amended Report and Recommendation, (2) Respondent's

Motion to Dismiss is GRANTED, and (3) Judgment be entered denying and dismissing the Petition with prejudice.

DATED: _____

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CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE